IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 8397 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

==========

JAISHREEBEN BIPINBHAI KURAY & 2 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :
MR CHIRAG B PATEL for Applicants
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent No.1
None for Respondent(s) : 2,

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 13/08/2007

ORAL JUDGMENT

1. By way of this application under Section 482 of the Criminal Procedure Code ('***Cr.P.C***.' for short), the petitioners – original accused Nos.2,3 and 4 have

prayed for an appropriate order to quash and set aside the complaint being Criminal Case No. 1613 of 2006 pending in the Court of learned Principal Civil Judge(JD), Kadi which has been filed against the petitioner and others for the offences punishable under Section 138 of the Negotiable Instruments Act ('***N.I.Act***' for short).

2. A Criminal complaint being criminal case No.1613 of 2006 is filed by respondent No.2 against the petitioner and others in the Court of learned Principal Judge (JD), Kadi for the offence punishable under Section 138 of the N.I.Act alleging *inter-alia* that original petitioner and other accused are Directors and Administrators of one 'Amarnath Fab Private Limited' who have purchased wood worth Rs.3,04,149/- from the complainant and towards the said dues, six cheques of Rs.20,000/- were given, out of which one cheque bearing No.396299 for an amount of Rs.20,000/- dated 05.07.2006 was deposited in the Bank and; that same came to be returned with an endorsement 'insufficient funds'. It is alleged in the complaint that statutory notice was served upon all the accused persons and inspite of that payment

was not made, therefore, the accused- persons inclusive of the petitioners have committed the offence under Section 138 of the N.I.Act. It is alleged in the complaint that said cheque was signed by original accused No.1 as Director of 'Amarnath Fab Private Limited' and other accused are Directors and Administrators of 'Amarnath Fab Private Limited'. That the learned trial Court has passed an order for inquiry under Section 202 of the Criminal Procedure Code. It also appears that bailable warrants are issued against the petitioners and therefore, the petitioners have preferred the present application under Section 482 of the Cr.P.C. to quash the impugned complaint.

3. Mr.B.S.Patel, learned Advocate appearing on behalf of the petitioners has submitted that the petitioners are not Directors in the Company i.e. 'Amarnath Fab Private Limited' and infact the petitioners are Directors in one Jaslend Finance Limited who has advanced to the said Company and for protection of finance company, the petitioners ***were keeping watch*** on the working of the company but never participated as Directors. It is submitted that on

vague statements that too some of the accused are directly and some of the accused are indirectly managing the affairs of the company, impugned complaint has been filed. It is submitted that the petitioners are falsely implicated and therefore, it is apparently abuse of process of law. It is submitted that it was the duty of respondent no.2 to verify who are the Directors of the Company and without verifying the record, the petitioners have been falsely implicated in the offence. It is submitted that the petitioners are not the Directors of 'Amarnath Fab Private Limited' and in that event in view of the law laid down by the Hon'ble Supreme Court in the case of ***SMS Pharmaceutical Limited v/s. Nita Bhalla*** reported in *2005 (3) GLH 513* impugned complaint *qua* the petitioners requires to be quashed. It is submitted that the cheque in question has been signed by one Akhilesh Bhatiya – accused No.1 and nowhere the names of the petitioners are disclosed. Under the circumstances, it is requested to exercise powers under Section 482 of the Cr.P.C. An additional affidavit is filed by petitioner No.1 explaining their association with the Company - 'Amarnath Fab

Private Limited' and explaining their ***keeping watch on the working of the Company***. It is submitted that the petitioner Nos. 1 and 2 are Directors of Jaslend Finance Limited and large amount is due of the finance company, ***watch has been kept*** to see that the company may not dispose of the properties at throwaway price so that the finance company may not be in a position to recover the amount. It is submitted that infact machineries, buildings etc. of the company are mortgaged with the Oriental Bank of Commerce and the finance company has advanced the money without any security as it is unsecured loan and hence ***watch has been kept*** with a view to see that the properties of the company i.e. movable and immovable are maintained and may not be sold away or removed. It is submitted that none of the petitioners were incharge or responsible to the company for the conduct of business of the company- 'Amarnath Fab Private Limited' and therefore, impugned complaint against the petitioners under Section 138 of the N.I.Act is not maintainable and/or it cannot be said that the petitioners have committed any offence as alleged under Section 138 of the N.I.Act. Therefore,

it is requested to quash the impugned complaint. Mr.B.S.Patel, learned Advocate appearing on behalf of the petitioners has relied upon decision of the Hon'ble Supreme Court in the case of ***K.Srikanth Singh V/s. M/s. North East Securities Ltd. & Anr.*** reported in *2007 (9) Scale 371* in support of his submission to quash and set aside the impugned complaint.

4. On the other hand, while opposing the present application and the prayer of the petitioner to quash the impugned complaint, Mr.Mengdey, learned Additional Public Prosecutor has submitted that looking to the averments and allegations in the complaint, ingredients of Section 138 are satisfied and even considering Section 141 of N.I.Act – any person incharge and/or day to day affairs of the Company other than Directors can also be held vicarious liabile and even considering the case of the petitioners in the petition itself and they have stated that they are ***keeping watch on the affairs of the Company.*** Now what type of ***watch*** is kept is required to be considered at the time of trial on leading proper evidence. He has submitted that on leading proper evidence and it might come in evidence

that keeping watch means overall control of finance of the company who has issued the cheque and therefore, they can also be held vicarious liable and whatever is submitted on behalf of the petitioners is their defence which is required to be considered at the time of trial and, therefore, it is required to dismiss the present application.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. At the outset, it is required to be noted that in the complaint it is specifically mentioned that the petitioners are Directors and Administrators of the company who has issued the cheque i.e. 'Amarnath Fab Private Limited' and; that cheque has been deposited which has been dishononred with an endorsement 'insufficient funds'. It is the contention on behalf of the petitioners that they are not the Directors of the Company - 'Amarnath Fab Private Limited' who has issued the cheque in question. However, they have given advance to the said company and for the protection of the finance company as Directors of the Finance Company ***they were***

keeping watch on the working of the company and they had never participated as Directors. Now considering the provisions of Section 141 of the N.I.Act any person who is found to be incharge of day to day management and affairs of the Company can also be held vicariously liable for the offence punishable under Section 138 of the N.I.Act. Now what type of ***watch was being kept on the working of the Company*** by the petitioners as Directors of the Finance Company is a question of evidence which is required to be considered only at the stage of trial. It is the case on behalf of the petitioners more particularly, petitioner nos. 1 and 2, that they are Directors of the Finance Company who had advanced finance to the company and; that for protection of finance company ***they were keeping watch on the working of the company***, thus even considering the case on behalf of the respective petitioners, *prima-facie* it cannot be said that they are not associated with the Company and/or in administration of the Company. Further in additional affidavit it is specifically the case on behalf of the petitioners that as large amount is due of the finance company, ***watch has been kept*** to see

that the management of the company may not dispose of the properties at throwaway price so that the finance company may not be in a position to recover the amount and; that the finance company has advanced the money without any security as it is unsecured loan and hence, ***watch has been kept*** with a view to see that the properties of the company are maintained and may not be sold away or removed. Even considering the additional affidavit it can be said that the petitioners by keeping watch can be said to be administrating the management of the Company. Considering above, at this stage it cannot be said that the petitioners have not committed any offence under Section 138 of the N.I.Act and/or they cannot be held vicariously liable under the provisions of N.I.Act. On leading proper evidence it may come on record and/or evidence that by keeping ***watch*** the entire administration and management of the Company was with the petitioners and/or financial control was with the petitioners. Merely because the petitioners were not Directors of the Company who have issued the cheque is no ground to quash the complaint under Section 138 of the N.I.Act and as held earlier any

person found to be in management and affairs of the company can be held vicariously liable. Now considering petitioners' own case of keeping ***watch*** on the management of the company and; that whatever submitted on behalf of the petitioners is their defence which is required to be considered only at the stage of trial and it is further required to be investigated '***what type of watch was kept by the petitioners***'. Under the circumstances, no case is made out to quash and set aside the impugned complaint in exercise of powers under Section 482 of the Cr.P.C. Considering the aforesaid facts and circumstances, the decision of the Hon'ble Supreme Court referred to above and relied upon by the petitioners are not of any assistance to the petitioners.

7. For the reasons stated above, the prayer of the petitioners to quash and set aside the impugned complaint is hereby rejected. The present application requires to be dismissed and accordingly it is dismissed.

[M.R.Shah, J.]

satish